83-200

NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

WESLEY JOE TARPLEY,
Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When an isolated portion of the jury instructions in a state criminal trial which might be construed as authorizing a conviction for a type of the offense of credit card abuse other than that alleged in the indictment is immediately followed by language requiring the jury to find that the defendant committed the offense alleged in the indictment, and the jury is instructed that it can find the Petitioner guilty only of the offense charged, and no objection is made to the charge, and the evidence is sufficient to sustain a conviction for either offense, does the erroneous instruction justify the granting of federal habeas relief?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 18, 1983, rehearing en banc denied on July 6, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 157, *reh. denied*, __ F.2d __ (5th Cir., July 6, 1983).

(Appendices A and B). The report and recommendation of the United States Magistrate, adopted by the district court, appears as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 18, 1983. A timely filed petition for rehearing en banc was denied on July 6, 1983. This petition for writ of certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent was indicted for the offense of credit card abuse. He entered a plea of not guilty and was tried by a jury in the 104th District Court of Taylor County, Texas. On May 3, 1976, the jury found Respondent guilty of the offense charged and assessed [illegible] punishment at imprisonment for eight years. The c[illegible]tion subse-

quently was affirmed by the Texas Court of Criminal Appeals. *Tarpley v. State*, 565 S.W.2d 525 (Tex.Crim. App. 1978). Respondent has filed five state applications for writ of habeas corpus challenging this conviction, and they were denied by the Court of Appeals on September 20, 1978; April 4, 1979; November 7, 1979; March 19, 1980; and December 3, 1980. *Ex parte Tarpley*, Application No. 3609. Respondent has filed one previous application for federal habeas corpus relief, and it was dismissed for failure to exhaust state remedies. *Tarpley v. Estelle*, No. CA1-81-37. On August 6, 1981, the district court adopted the findings, conclusion and recommendation of the magistrate and denied the writ. This appeal followed.

On March 28, 1982, a panel of the United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial court and held that the writ should have been granted on the basis of erroneous jury instructions which it found might have allowed the jury to convict for an offense other than that alleged in the indictment.

B. Statement of Facts

The indictment returned against Respondent alleged that on or about January 27, 1976, he did:

> knowingly and intentionally with intent to fraudulently obtain services, to-wit: lodging, belonging to Emmett Martin present and use a BankAmericard credit card, belonging to J. M. Gassiot, hereinafter called card holder, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley and was not used with the effective consent of the card holder . . .

(Tr. 3; *see* Appendix D).[1]

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1. "Tr." refers to the transcript of Respondent's state trial; "SF" refers to the statement of facts.

Respondent and John Wayne Hudson were arrested on the morning of January 28, 1976, in Room No. 9 of the Sun Valley Lodge in Abilene, Texas, which had been rented the previous evening in the name of J. M. Gassiot (SF 134-36, 160). The complaining witness testified that Respondent was similar in appearance to the companion of a man who paid for the room with a BankAmericard issued to Gassiot (SF 146-48). The arresting officers found numerous credit cards issued to Gassiot and one James L. Adams, as well as checks for Imported Overseas Auto Parts of Fort Worth, Texas, in the motel room (SF 161-276). Several of these items were found in a locked lockbox owned by Respondent (SF 226-31), the keys to which were among Respondent's James L. Adams, as well as checks for Imported Overseas Auto Parts of Fort Worth, Texas, in the motel room (SF 161-276). Several of these items were found in a locked lockbox owned by Respondent (SF 226-31), the keys to which were among Respondent's personal effects (SF 225-26). That box also contained a Selective Service registration card in the name of Jimmie Miles Gassiot (SF 230) and personal papers bearing Respondent's name (SF 281). The key to the motel room was found on Respondent's key ring (SF 276).

Gassiot testified that he worked for Imported Auto Center of Fort Worth, a division of Imported Overseas Auto Parts (SF 282), and that his credit cards and those of several co-workers were taken in a burglary in December of 1975 (SF 283-84). He also testified that the company checkbook was taken from his place of business (SF 285). Respondent did not testify or offer any evidence.

In applying the law to the facts of the case, the court instructed the jury as follows:

> Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant,

> Wesley Tarpley, did, in Taylor County, Texas, on or about January 27, 1976, receive services, to-wit: lodging with intent to obtain the service fraudulently, had used a credit card, to-wit: BankAmericard Credit Card No. 4656-100-053-011 belonging to J. M. Gassiot, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley, and was not used with the effective consent of the said J. M. Gassiot, you will find the Defendant guilty.
>
> If you do not so believe, or if you have a reasonable doubt thereof, you will find the Defendant not guilty.

(Tr. 28; *see* Appendix E). The court then instructed the jury on the law of parties pursuant to Sections 7.01 and 7.02 of the Texas Penal Code and also gave an instruction on the law of circumstantial evidence (Tr. 29). Respondent did not object to these instructions.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding that Respondent was not put on notice as to what allegations he must defend against because the indictment charged him with the offense of credit card abuse under Section 32.31(b)(1)(A) of the Texas Penal Code and the jury was authorized to convict him of credit card abuse under Section 32.31(b)(3). Although the jury instruction erroneously included language defining the offense of credit card abuse under this latter section, the jury was instructed that it was necessary to find that Respondent "had used a credit card" without the effective consent of the owner. The faulty instructions did not authorize a conviction for an offense other than that alleged in the indictment. Viewed as a whole, the instructions were not so defective as to render the trial fundamentally unfair and thereby deny Respondent due process of law. Par-

ticularly is this so in light of the circumstances of this case. Respondent did not testify or present any evidence in his behalf; neither, significantly, did he object to these instructions. Even more importantly, the court specifically admonished the jury that it could find Respondent guilty only of the offense alleged. Issuance of the Great Writ under these circumstances elevates form over substance and runs contrary to the substantive spirit of habeas corpus.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit disregarded controlling decisions of this Court and failed to consider all the circumstances of Respondent's trial in holding that the court's jury instructions denied Respondent due process of law.

II.

THE JURY INSTRUCTIONS DID NOT AUTHORIZE A CONVICTION ON A THEORY OTHER THAN THAT ALLEGED IN THE INDICTMENT AND THEREFORE DID NOT DENY RESPONDENT DUE PROCESS OF LAW

Respondent was indicted for having committed the offense of credit card abuse as denounced by V.T.C.A. Penal Code §32.31(b)(1)(A), which provides as follows:

(b) A person commits an offense if:

> (a) with intent to obtain property or service fraudulently, he presents or uses a credit card with knowledge that:

> (A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder;

Respondent claimed, and the Court of Appeals found, that the jury instructions authorized a conviction under this section and also under Section 32.31(b)(3), which provides as follows:

> (b) A person commits an offense if:
>
> * * *
>
> (3) he receives property or service that he knows has been obtained in violation of this section;

The resistance of the federal courts to habeas petitioners' claims of erroneous jury instructions is firmly established. Improper instructions cannot support the granting of habeas relief unless they are so defective as to constitute a denial of due process and render the trial fundamentally unfair. *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Cupp v. Naughten*, 414 U.S. 684 (1975). It also is well settled that the propriety of a given instruction is not reviewed in the abstract or in isolation; rather, the adequacy of the entire charge taken in the context of the entire trial is the proper scope of inquiry. *United States v. Parks*, 421 U.S. 658, 674-75 (1975); *Cupp v. Naughten*, 414 U.S. at 146-47. Further, because of the finality problems and comity concerns involved in a state prisoner's challenge to a criminal conviction, the showing required for obtaining federal habeas relief on the basis of erroneous jury instructions is "greater than the showing required to establish plain error on direct appeal." *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Henderson v. Kibbe*, 431 U.S. at 154.

In reversing the federal district court's denial of habeas relief, the Court of Appeals disregarded these controlling legal principles. Although the panel recognized that "the second part of the jury charge . . . closely adhered to the words of §32.31(b)(1)(A)" and "[t]he jury might have followed this portion of the charge and properly convicted Tarpley, . . ." it held that the ambiguity created by the instructions' prior reference to Section 32.31(b)(3) created a possibility that the jury instead could have convicted Respondent of this uncharged offense. 703 F.2d at 161.

In fact, when the charge is viewed as a whole, it cannot be said that the jury was authorized to convict under Section 32.31(b)(3). Immediately following the language tracking this section, the court specifically instructed the jury that in order to convict, it must find that Respondent "had used a credit card" belonging to another and that the card "was not used" with the owner's effective consent. The indictment was read to the jury prior to trial, and the court instructed the jury that it could consider evidence of "the Defendant's having committed offenses other than that alleged against him in the indictment" only for the purpose of "determining the identity or intent of the Defendant, if any, in connection with the offense, if any, *alleged against him in the indictment*, and for no other purpose" (emphasis added). Finally, the court instructed the jury that its only function was "to find the guilt, if any, or the innocence of the Defendant *of the offense charged in the indictment* . . ." (emphasis added). Thus, the court's instructions carefully limited the jury's consideration to the offense charged.

Respondent did not testify or offer any evidence, and the Court of Appeals specifically found that the evidence of his guilt of the offense charged was sufficient, even under the stringent state circumstantial

evidence rule that it "exclude, to a moral certainty, every other reasonable hypothesis except the Defendant's guilt." 703 F.2d at 162 n.8. Because the evidence clearly showed that Respondent was guilty of having *used* a stolen credit card to fraudulently obtain services, it necessarily follows that it was sufficient to sustain a conviction for having *received* stolen services. Because Respondent has utterly failed to allege actual harm, and because the jury instructions *viewed in their entirety* authorized only a conviction for the offense for which Respondent was indicted, the court's inadvertently erroneous statements were non-prejudicial.

Just as *United States v. Irwin*, 661 F.2d 1063 (5th Cir. 1981), this is not a case in which the court specifically stated that the jury could convict the defendant of an offense other than that alleged. Here, as in *Irwin*, the jury "might have" convicted Respondent for offenses not alleged in the indictment "only if it misunderstood the charge." 661 F.2d at 1070. The cases cited by the Court of Appeals — *Gray v. Raines*, 662 F.2d 569 (9th Cir. 1981); *Goodloe v. Parratt*, 605 F.2d 1041 (8th Cir. 1979); *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) — are simply inapposite. In each of those situations, the defendant was charged with a specific offense and then, at trial, the prosecution was allowed to alter its theory of the case and obtain a conviction for a different offense. Here, the record is devoid of any indication that the prosecution sought to convict Respondent of any offense other than that with which he was charged. The *only* suggestion that Respondent "might have" been convicted of another offense is the single, isolated jury instruction which was immediately followed by language authorizing a conviction only for the offense alleged in the indictment and which was also followed by repeated admonitions that Respondent could be convicted of that offense and no other. The record also reflects that Respondent offered no evidence and that the evidence presented by the State was sufficient "to exclude, to a moral cer-

tainty," his guilt of either offense. *Engle* teaches that a habeas petitioner must establish cause and " actual prejudice" to avoid the procedural default bar of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). Here, the Court of Appeals granted substantive habeas relief even though there is not even a whisper of suggestion as to how Respondent might have been harmed.

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1596

WESLEY JOE TARPLEY,
Petitioner-Appellant,

versus

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 4/18/83, 5 Cir., 198____, _____F.2d_____).

(July 6, 1983)

Before WISDOM, RUBIN and TATE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-8

APPENDIX B

WESLEY JOE TARPLEY,
Petitioner-Appellant,
v.
W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 81-1596.

United States Court of Appeals,
Fifth Circuit.

April 18, 1983.

Texas prisoner sought federal habeas relief. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) Sixth and Fourteenth Amendment right to notice of charges was violated where instructions permitted conviction of an uncharged crime, and (2) there was no Sixth Amendment violation in failure to appoint counsel prior to indictment.

Reversed and remanded.

1. Habeas Corpus —45.2(4)

Improper jury instructions in state criminal trials do not generally form the basis for federal habeas relief. 28 U.S.C.A. § 2254.

2. Habeas Corpus —30(1)

Defendant's failure to object to jury charge at trial level did not preclude federal habeas court from con-

sidering claim that charge authorized conviction of a crime for which defendant was not charged where state habeas court addressed the matter on the merits. 28 U.S.C.A. § 2254.

3. Constitutional Law —268(11)

Where indictment charged only credit card abuse but instructions contained elements of both that offense and of separate offense of receiving property for services obtained by illegal credit card use and reasonable jurors could have understood charge to allow conviction on the latter offense, the instructions abridged defendant's Sixth and Fourteenth Amendment right to notice of charges. V.T.C.A., Penal Code § 32.31(b)(1)(A), (b)(3); U.S.C.A. Const.Amends. 6, 14.

4. False Pretenses —49(1)

Evidence that defendant was present when his companion checked into motel using stolen credit cards and that stolen credit cards and papers were found in locked box owned by defendants, with key found on defendant's person, sufficed to sustain conviction of credit card abuse. V.T.C.A., Penal Code §§ 32.31, 32.31(b)(1)(A).

5. Criminal Law —651.3

It is only when the government has committed itself to prosecute that Sixth Amendment right to counsel attaches. U.S.C.A. Const.Amend. 6.

6. Criminal Law —641.3

Neither defendant's arrest nor appearances before magistrate triggered right to counsel as no adversary judicial proceedings were commenced prior to return of indictment. U.S.C.A. Const.Amend. 6.

7. Criminal Law —224, 1166.11

Even if petitioner was entitled to counsel prior to indictment, there was no showing of prejudice from failure to receive appointed counsel at that time and even if counsel had been appointed the petitioner, whose only complaint was that he did not receive examining trial provided for by Texas law, would have lost his right to examining trial once indictment was returned. Vernon's Ann.Texas C.C.P. art. 16.01; U.S.C.A. Const.Amend. 6.

8. Criminal Law —190

Where there was sufficient evidence to sustain conviction, the state was not precluded from retrying petitioner, notwithstanding that conviction was infirm because instruction permitted conviction on a crime which was not charged.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, RUBIN and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The jury instructions in Wesley Joe Tarpley's state criminal trial permitted the jury to convict him of a crime with which he was not charged. Because we conclude that the instructions thereby abridged Tarpley's sixth and fourteenth amendment right to notice of the charges against him, we reverse the district court's denial of his petition for a writ of habeas corpus.

In December 1975, someone burglarized the Imported Auto Center of Fort Worth, Texas. The burglars took the company checkbook and credit cards belonging to

company employees. J.M. Gassiot's credit card was among those stolen.

On January 27, 1976, Tarpley and John Wayne Hudson checked into an Abilene, Texas, motel. Hudson registered under the name J.M. Gassiot and paid for the room with Gassiot's credit card. There is some evidence from which a tenuous inference might be drawn that Tarpley was with Hudson when he registered. The arresting officers found credit cards, checks, and other documents from the Auto Center in their room. Some of these items were in a locked box owned by Tarpley. The officers found the key to this box on Tarpley's person.

Tarpley was brought before a magistrate shortly after his arrest. Although he now claims he requested counsel at this time, there is no record evidence of such a request. On January 6, 1976, a Taylor County, Texas grand jury indicted Tarpley for credit card abuse under Texas Penal Code Ann. § 32.31(b)(1)(A) (1974).[1] Two weeks later, counsel was appointed to represent Tarpley.

Although the indictment charged Tarpley only with credit card abuse under § 32.31(b)(1)(A),[2] the trial

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1. In relevant part, Tex.Penal Code Ann. § 32.31 (1974) provides:
(b)A person commits an offense if:

> (1) with intent to obtain property or service fraudulently, he presents or uses a credit card with knowledge that:
> (A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder; . . . .
> (3) he receives property or service that he knows has been obtained in violation of this section.

2. The indictment alleged that on or about January 27, 1976, Tarpley:

(footnote continued on following page)

judge's instructions contained elements of both this offense and of receiving property or services obtained by illegal credit card use, another offense under § 32.31(b)(3).[3] Tarpley did not object to the charge, and the jury returned a guilty verdict.

Tarpley's conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals. *Tarpley v. State*, 565 S.W.2d 525 (Tex.Cr.App.1978). He brought five unsuccessful state habeas proceedings. In addition, this is Tarpley's second application for federal habeas relief. His first was denied for failure to exhaust state remedies. *Tarpley v. Estelle*, No. CA1-80-26 (N.D. Tex. Aug. 5, 1980).

(footnote continued from previous page)

> Knowlingly and intentionally with intent to fraudulently obtain services, to wit; lodging, belonging to Emmett Martin present and use a BankAmericard credit card, belonging to J.M. Gassiot, hereinafter called cardholder, with knowledge that such credit had not been issued to him, the said Wesley Tarpley and was not used with the effective consent of the card holder . . . .

3. The instructions provided in relevant part:

> A person commits the offense of credit card abuse if he receives services that he knows has been obtained by a person who, with intent to obtain service fraudulently, used a credit card with knowledge that it had not been issued to said person. . . .
> Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant, Wesley Tarpley, did, in Taylor county, Texas, on or about January 27, 1976, receive services, to wit: lodging with intent to obtain the services fraudulently, had used a credit card . . . belonging to J.M. Gassiot, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley, and was not used with the effective consent of the said J.M. Gassiot, you will find the Defendant guilty.

I.

[1] Tarpley faces an extraordinarily heavy burden. Improper jury instructions in state criminal trials do not generally form the basis for federal habeas relief. *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of the state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977) (footnote omitted).

[2] "Before a federal court may grant relief under 28 U.S.C. § 2254 based on alleged error in a state trial court's unobjected to charge, the error must be so egregious as to rise to the level of a constitutional violation or so prejudicial as to render the trial itself fundamentally unfair." *Baldwin v. Blackburn*, 653 F.2d 942, 951 (5th Cir.1981), *cert. denied*, _____U.S._____. 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982); *Bryan v. Wainwright*, 588 F.2d 1108, 1110-11 (5th Cir.1979).[4] "'[I]t must be established not only that the instruction [was] undesirable, erroneous, or even 'universally condemned,'

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4. Although Tarpley failed to object to the jury charge, the Texas court addressed on the merits his subsequent challenge to the charge. *See Tarpley v. Estelle*, No. 5149-B (Tex.Dist.Ct. Taylor Cty. Oct. 16, 1979). Therefore, Tarpley's failure to object to the charge does not prevent us from addressing his claim. "We are not barred from reviewing a claim by a state court procedural rule when the state courts themselves have not followed the rule." *Bell v. Watkins*, 692 F.2d 999, 1003 (5th Cir.1982), *modified on rehearing*, No. 81-4358, slip op. at 2704 (5th Cir. Feb. 28, 1983); *Burns v. Estelle*, 592 F.2d 1297, 1302 (5th Cir.1979), *aff'd en banc*, 626 F.2d 396 (5th Cir.1980).

but that it violated some right which was guaranteed to the defendant by the fourteenth amendment, and the 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Washington v. Watkins*, 655 F.2d 1346, 1369 (5th Cir.1981). *cert. denied*, _____U.S._____, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (quoting *Cupp*, 414 U.S. at 146, 147, 94 S.Ct. at 400, 38 L.Ed.2d at 373); *accord Hance v. Zant*, 696 F.2d 940, 953 (11th Cir.1983).

In applying these principles to the instructions in Tarpley's case, we pay "careful attention to the words actually spoken to the jury, . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39, 44 (1979); *Washington v. Watkins*, 655 F.2d at 1369. And we are mindful that "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the entire charge." *Cupp*, 414 U.S. at 146-147; 94 S.Ct. at 400, 38 L.Ed.2d at 373; *accord Washington v. Watkins*, 655 F.2d at 1369; *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

[3] Our review of the entire charge given in Tarpley's case convinces us that a reasonable juror could have understood the charge to allow conviction of an offense other than the one for which Tarpley was indicted. The indictment charged him only with violating § 32.31 (b)(1)(A). The elements of that offense are: "(1) a person; (2) with intent to fraudulently obtain; (3) property or service; (4) presents or uses; (5) credit card; (6) with knowledge that it is not used with effective consent of cardholder." *Ex parte Williams*, 622 S.W.2d 876, 877 (Tex.Cr.App.1981) (en banc); *accord Harris v. Texas*, 629

S.W.2d 805, 806 (Tex. App.1982); *Ex parte Dawson*, 578 S.W.2d 749, 750 (Tex.Cr.App.1979); *Ex parte Walters*, 566 S.W.2d 622, 624 (Tex.Cr.App.1978).

The first paragraph of the court's instruction quoted in footnote 3, *supra*, however, informed the jurors that they could convict Tarpley for "receiv[ing] services that he [knew had] been obtained by a person who, with intent to obtain service fraudulently, used a credit card with knowledge that it had not been issued to said person. . ." This part of the judge's charge tracked the language of § 32.31(b)(3). A reasonable juror could have concluded from this instruction that Tarpley was subjected to conviction for violating § 32.31(b)(3), although he was never indicted or otherwise charged under that provision.

Although the state admits that the portion of the instruction quoted above misstated the crime charged against Tarpley, it argues that the jury did not convict Tarpley by reason of that misstatement. Instead the state argues, the jury followed the second paragraph of the jury charge quoted in footnote 3, *supra*. This part of the judge's charge closely adhered to the words of § 32.31(b)(1)(A). The jury might have followed this portion of the charge and properly convicted Tarpley for complicity in Hudson's violation of §32.31(b)(1)(A).

We cannot confidently conclude, however, that the jury followed this part of the charge as opposed to the erroneous portion. "[A]t best, the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge." *Washington v. Watkins*, 655 F.2d at 1369. This is an insufficient response to Tarpley's claim for "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction." *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454, 61 L.Ed.2d at 44 (emphasis add-

ed); *Washington v. Watkins*, 655 F.2d at 1369. The jury could have followed the erroneous portion of the judge's charge. If they did so, Tarpley was convicted for violating § 32.31(b)(3), a crime he was never charged with committing.

"No principle of procedural due process is more clearly established than that notice of the *specific charge*, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517 92 L.Ed. 644, 647 (1948) (emphasis added).[5] As guarantors of this constitutional right, the federal courts have not hesitated to grant habeas relief to a state criminal defendant convicted of an offense other than that for which he was charged. Thus, in *Gray v. Raines*, 662 F.2d 569 (9th Cir.1981), the Ninth Circuit considered a case in which the defendant was indicted for first degree rape. The state, however, obtained an instruction on statutory rape. The court granted relief, noting, "A person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense ..." *Id.* at 572 (quoting *In re Hess*, 45 Cal.2d 171, 173, 288 P.2d 5, 7 (1955) (Traynor, J.)). *Accord Watson v. Jago*, 558 F.2d 330 (6th Cir.1977) (indictment charged first-degree murder, prosecution proceeded on felony murder theory); *Goodloe v. Parratt*,

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5. The sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ..." This guarantee is applicable to the states through the due process clause of the fourteenth amendment. *In re Oliver*, 333 U.S. 257, 273-74, 68 S.Ct. 499, 507-08, 92 L.Ed. 682, 694 (1948); *Spinkellink v. Wainwright*, 578 F.2d 582, 609 n. 32 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

605 F.2d 1041 (8th Cir.1979) (indictment charged operating a motor vehicle to avoid arrest for driving with a suspended license, instruction charged flight to avoid prosecution for willful and reckless driving); *Blake v. Morford*, 563 F.2d 248, 250 (6th Cir.1977) (dictum; "Appellant raises a constitutional issue by alleging that he was convicted on a charge not stated in the indictment.").[6]

Because the jurors might reasonably have concluded from their instructions that Tarpley was subject to conviction for violating either § 32.31(b)(1)(A) or § 32.41(b)(3), when he was charged with only the former offense, we conclude that the charge, read as a whole, "so infected the entire trial that the resulting conviction violate[d] due process." *Washington v. Watkins*, 655 F.2d at 1369.[7] The district court should have granted Tarpley's petition for a writ of habeas corpus on this basis.

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6. Because the state has never suggested that Tarpley actually knew the state might attempt to proceed against him under §32.31(b)(3), we need not decide whether the failure to charge that offense in the indictment constituted a per se sixth amendment violation, or whether relief would be required only if Tarpley in fact was unaware that the prosecution might proceed on that theory. *Compare Gray v. Raines*, 662 F.2d at 572 *with id.* at 574 (Tang, J., concurring).

7. We note that in federal courts, the fifth amendment's guarantee of a grand jury indictment prohibits the sort of constructive amendment of the indictment that was worked by Tarpley's jury instructions. *See Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887); *United States v. Irwin*, 661 F.2d 1063, 1069 (5th Cir.1981), *cert. denied*, 456 U.S. 907, 102 S.Ct. 1754, 72 L.Ed.2d 164 (1982). That constitutional protection, however, has never been incorporated into the fourteenth amendment's due process clause; it is inapplicable to state proceedings. *See Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Nevertheless, at least

(footnote continued on following page)

II.

[4] Tarpley also contends that the evidence was insufficient to sustain his conviction for violating §32.31(b)(1)(A). This claim is without merit. The Texas Court of Criminal Appeals concluded that there was sufficient evidence to convict Tarpley for complicity in Hudson's violation of the Statute. *Tarpley v. State*, 565 S.W.2d at 529. Our review is limited to determining whether, "viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found proof beyond a reasonable doubt," *Williams v. Maggio*, 695 F.2d 119, 121 (5th Cir.1983); *Acosta v. Turner*, 666 F.2d 949, 957 (5th Cir.1982). *See also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under Texas law, one is guilty as a party if he: "(1) is physically present at the commission of the offense either by words or other agreement." *Tarpley v. State*, 565 S.W.2d at 529. There was evidence that Tarpley was present when Hudson presented the stolen credit card at the motel. The fact that stolen credit cards and papers were found in his locked box suggests that he had agreed with Hudson to use the credit cards fraudulently. There was sufficient evidence to allow a jury to find guilt beyond a reasonable doubt.[8]

(footnote continued from previous page)

one court has relied on *Stirone* and *Bain* in determining whether a similar "constructive amendment" in a state prosecution abridged the defendant's sixth amendment right to notice. *See Watson v. Jago*, 558 F.2d at 339.

8. Tarpley notes that the trial judge instructed the jury that, to convict, they had to "exclude, to a moral certainty, every other reasonable hypotheses except the Defendant's guilt." He argues that due process requires the state to follow its rules establishing a burden of proof stricter than required by *Jackson v. Virginia*. *See Holloway v. McElroy*, 632 F.2d 605, 640 n. 55 (5th Cir.1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 393 (1981). We need not decide whether due process requires such a strict burden of proof. Even if it were required in this case, we would find that the evidence, as summarized in the text, was sufficient.

III.

[5] Tarpley's complaint that counsel was not appointed to represent him prior to his indictment is equally meritless. "[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 689, 690, 92 S.Ct. 1877, 1881-83, 32 L.Ed.2d 411, 417, 418 (1972); *accord Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977); *Lomax v. Alabama*, 629 F.2d 413, 415 (5th Cir.1980), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1712, 68 L.Ed.2d 205 (1982); *McGee v. Estelle*, 625 F.2d 1206 (5th Cir.1980), *cert. denied*, 449 U.S. 1089, 101 S.Ct. 883, 66 L.Ed.2d 817 (1981). Thus, it is only when "the government has committed itself to prosecute" that the defendant is entitled to counsel. *Kirby*, 406 U.S. at 689, 92 S.Ct. at 1882, 32 L.Ed.2d at 417; *Moore*, 434 U.S. at 228, 98 S.Ct. at 465, 54 L.Ed.2d at 433.

[6] Nothing in the record indicates that adversary judicial proceedings has been commenced against Tarpley prior to the return of the indictment against him. It is settled that neither his arrest nor his appearance before the magistrate triggered the right to counsel. *See McGee*, 625 F.2d at 1208, 1209. Tarpley simply was not entitled to counsel at the time of the claimed deprivation.

[7] Even if Tarpley could show that he was entitled to counsel prior to his indictment, he has shown no prejudice arising from his failure to receive appointed counsel at that time. His only complaint is that he did not receive the examining trial provided for by the Texas Code Crim.Proc.Ann. art. 16.01 (Vernon 1977). Yet he does not explain how counsel would have obtained an examining trial for him. Under Texas law, a defendant loses his right to an examining trial when he is in-

dicted, for "the return of a true bill by the grand jury satisfies the principal purpose and justification for such a preliminary hearing—that there is probable cause to believe the accused committed the crime charged." *Brown v. State*, 475 S.W.2d 938, 946 (Tex.Cr.App.1971); *accord Tarpley v. State*, 565 S.W.2d at 532; *Bullard v. State*, 533 S.W.2d 812 (Tex.Cr.App.1976); *McDonald v. State*, 513 S.W.2d 44, 46 (Tex.Cr.App.1974). Therefore, even if counsel had been appointed, Tarpley would have lost his right to an examining trial once the indictment was returned. Moreover, the indictment provided him with the guarantee of probable cause to prosecute that an examining trial is designed to provide. We, therefore, conclude that Tarpley, even if entitled to counsel, was not prejudiced by the state's failure to provide it.

IV.

[8] Because of the disposition we reach with respect to the jury instructions, we need not reach Tarpley's alternative claim that the prosecutor made improper remarks in closing argument. We conclude that the district court should have granted Tarpley's writ. Because we find that there was sufficient evidence to sustain Tarpley's conviction, however, the state is not precluded from retrying him if it chooses to do so.

For these reasons, the judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

WESLEY JOE TARPLEY,	§	
Petitioner	§	
	§	
VS.	§	CA1-81-37
	§	
W.J. ESTELLE, JR.,	§	
DIRECTOR, TEXAS	§	
DEPT. OF CORRECTIONS,	§	
	§	
Respondent	§	

REPORT AND RECOMMENDATION

Petitioner, Wesley Joe Tarpley, is a state prisoner by virtue of judgment and sentence of the 104th District Court of Taylor County, Texas, in cause number 5149B. A jury found petitioner guilty on May 3, 1976, under an indictment charging him with the felony offense of credit card abuse and on May 14, 1976, in accordance with the jury verdict, the trial judge sentenced petitioner to serve an indeterminate term of not less than two years nor more than eight years in Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed the conviction by its comprehensive opinion delivered May 10, 1978. *Tarpley v. State*, 565 SW2d 525 (Tex. Crim. 1978).

Petitioner has filed application for writ of habeas corpus pursuant to 28 U.S.C. §2241, *et seq.* and is proceeding *in forma pauperis*. Liberally construing his *pro se* pleadings he contends that (1) there was no probable cause for the warrantless arrest and tainted fruit of the

search following that arrest was used to obtain the conviction; (2) he was denied assistance of counsel from the time of his arrest until after the indictment had been returned, more than a month after his arrest; that he was prejudiced by having been denied the opportunity for an examining trial; and if he had been represented by counsel at the time the Grand Jury convened there could have been better direct evidence available to the Grand Jury which could have resulted in a no-bill; (3) there was no probable cause for the warrantless search of a locked lock box; (4) the indictment was fundamentally defective, because it did not give him notice that he was being prosecuted as a party; (5) the evidence was insufficient to support the conviction; (6) the court's charge was fundamentally defective, because it authorized conviction under theories of criminal behavior not alleged in the indictment; (7) records of a prior prison sentence were improperly admitted into evidence during the punishment phase of the bifurcated trial, because the records were hearsay, they denied him the right of confrontation, cross-examination and compulsory process of witnesses, and the prior conviction was constitutionally invalid; (8) prejudicial prosecutorial misconduct occurred during argument when the prosecutor commented on his failure to testify; and (9) he was denied effective assistance of counsel on the basis of 20 claimed acts of misfeasance or malfeasance on the part of the attorney.

The statement of facts of a pretrial hearing on motion to suppress, the statement of facts of the trial, the transcript of all state court proceedings, the briefs on appeal, and the comprehensive opinion of the Court of Criminal Appeals of Texas have been filed as exhibits in this case. On direct appeal to the Court of Criminal Appeals of Texas petitioner had raised as points of error, in order, the issues that (1) the evidence was insufficient to support the conviction, (2) there was no probable cause for the warrantless arrest and tainted fruit of the search following that arrest was used to obtain the conviction,

(3) there was no probable cause for the warrantless search of a locked lock box, (4) numerous checks and credit cards were improperly admitted into evidence, because they show inadmissible extraneous offenses, (5) prejudicial prosecutorial misconduct occurred during argument when the prosecutor commented on his failure to testify, and (6) he was denied assistance of counsel, due to poverty, from the date of his arrest until the arraignment one month later. The Court of Criminal Appeals of Texas rejected each of those challenges in its comprehensive opinion. Those points of error compare with the first, second, third, fifth, and eight contentions advanced in this application for writ of habeas corpus.

Petitioner filed application for writ of habeas corpus in the trial court, contending that he had been denied equal protection and due process when he could not adequately prepare a defense while incarcerated and that he was denied effective assistance of counsel. The trial judge entered order on July 18, 1978, concluding that petitioner had misinterpreted and misstated th facts and that the attorney representing petitioner was fully qualified and competent in his representation. The Court of Criminal Appeals denied the application without written order on September 20, 1978.

Petitioner returned to the state court with a new application for writ of habeas corpus, contending that evidence was illegally admitted against him and that the evidence was insufficient to support the conviction as a matter of law. The court entered order on March 20, 1979, and on April 4, 1979, the Court of Criminal Appeals of Texas denied the application without written order.

Petitioner filed a third application for writ of habeas corpus in the trial court, contending that the indictment was fatally defective, that there was a fata variance between the allegations in the indictment and the proof ad-

duced on trial, and that the jury charge was defective, because it authorized conviction under theories of criminal behavior not alleged in the indictment. Those issues compare with the fourth and sixth claims in this application for writ of habeas corpus. The trial judge entered order on October 16, 1979, and the Court of Criminal Appeals of Texas denied the application without written order on November 7, 1979.

Next, petitioner filed application for writ of habeas corpus in the trial court, challenging the receipt into evidence of records of a prior prison sentence during the punishment phase of the bifurcated trial. The contentions were rejected by the trial judge by order entered March 4, 1980, and the Court of Criminal Appeals of Texas denied the application without written order on March 19, 1980. That challenge compares with the seventh basis for federal habeas relief alleged in this petition. Notwithstanding respondent's claim to the contrary, a liberal reading of his application shows that he has substantially exhausted state remedies on the challenge.

Petitioner then filed application for writ of habeas corpus in this court in CA1-80-26. That application for writ of habeas corpus was dismissed without prejudice, because, in addition to the challenges above described, petitioner alleged nine separate deficiencies in representation by counsel for which he had not exhausted state remedies.

Petitioner returned to the trial court with his fifth application for writ of habeas corpus, detailing twenty separate acts of conduct which he contends support his claim that he was denied effective assistance of counsel. Those allegations are the same acts which are contained in this application for writ of habeas corpus as the ninth basis for relief. The trial judge entered order on November 18, 1980, and the Court of Criminal Appeals

of Texas denied the application without written order on December 3, 1980.

Petitioner has substantially exhausted available state remedies.

The indictment which was returned by the Taylor County Grand Jury charged that "on or about the 27th day of January, 1976,--Wesley Tarpley did-- unlawfully, knowingly and intentionally, with intent to fraudulently obtain services, to-wit: lodging, belonging to Emmitt Martin present and use a BankAmericard credit card, belonging to J.M. Gassiot, hereinafter called cardholder, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley, and was not used with the effective consent of the cardholder." The proof at the trial showed that a co-defendant, John Wayne Hudson, had been the person who actually presented the BankAmericard credit card in the name of J.M. Gassiot to the proprietor of the motor lodge where the services were furnished. Petitioner has seized upon the fact that his co-defendant was the person who actually presented the credit card for his challenges that the indictment was fundamentally defective, that the evidence was insufficient to support the conviction, that the charge was fundamentally defective because it authorized conviction under theories of criminal behavior not alleged in the indictment, and as bases for some of the challenges to effectiveness of counsel. Those contentions were fully developed by the Court of Criminal Appeals of Texas in its comprehensive opinion. In that opinion the court noted that one is guilty as a party (principal under the former Penal Code) where he is physically present at the commission of the offense and he encourages the commission of the offense, either by words or other agreement. In the opinion the appellate court rejected petitioner's argument that there was no evidence connecting him with the offense charged in the indictment. The court noted that

one may be guilty as a party, whether or not he aided in the commission of the offense and discussed the facts and circumstances surrounding the offense. It concluded that the evidence was sufficient to support the conviction of petitioner as a party. Those findings by the Court of Criminal Appeals of Texas are supported by the record and this court should adopt the comprehensive opinion of the Court of Criminal Appeals of Texas.

Those findings by the Court of Criminal Appeals of Texas effectively negate petitioner's claim that the indictment was fundamentally defective when it did not provide him with notice that he was being prosecuted as a party, that the charge was fundamentally defective because it authorized conviction under theories of criminal behavior not alleged in the indictment and that the evidence was insufficient to support the conviction. The state court has interpreted its own laws as permitting the prosecution and conviction of petitioner as a party. A state's interpretation of its own laws is no basis for federal habeas corpus relief since no constitutional question is involved. *Monk v. Blackburn*, 5th Cir. 1979, 605 F2d 837.

The Court of Criminal Appeals of Texas also found that there was, in fact, probable cause for the warrantless arrest and that the search following that arrest was properly used to obtain the conviction. It also found that there was probable cause for the warrantless search of the locked box. Again, the comprehensive opinion of the Court of Criminal Appeals of Texas is supported by the record and should be adopted by the court.

The Court of Criminal Appeals rejected the contention that the prosecutor had improperly commented on the failure of petitioner to testify. Petitioner's objection during the argument was sustained by the trial judge and an instruction to disregard was given. The Court of Criminal Appeals failed to find that the comment pre-

judicially commented on petitioner's failure to testify and concluded that the argument could reasonably have been taken as a reference to his failure to present witnesses or evidence of any kind on his behalf. In any event no substantial rights of the petitioner were prejudicially affected. Those findings by the Court of Criminal Appeals of Texas should be adopted by the court.

The Court of Criminal Appeals found no evidence in support of petitioner's contention that the indictment against him should have been dismissed on the grounds that he was not afforded an examining trial nor appointed counsel prior to arraignment. The failure to grant petitioner an examining trial was not a basis for challenge where there was nothing in the record to indicate that petitioner had requested an examining trial and the failure to grant an examining trial does not affect the indictment's validity.

Petitioner had been previously convicted of the felony offense of theft over fifty dollars in Tarrant County, Texas. In the interim between the Tarrant County conviction and the date of trial for the challenged offense the Penal Code was amended so that felony theft of personal property now contemplates that the property have value of $200.00. However, the offense was a felony at the time petitioner was convicted and for purposes of impeachment or for enhancement it remains a felony. The prior conviction for theft of personal property having a value of fifty dollars was not constitutionally invalid and petitioner's contention that the records of the prior prison sentence were improperly admitted into evidence does not rise to constitutional dimensions. In any event there is nothing in the record which reflects that an objection was timely interposed to the prison packet, either on the basis urged by petitioner in this application for writ of habeas corpus or on any other basis. As a matter of Texas law the failure to object to

the introduction of the prior conviction on the bases now urged by petitioner constitutes waiver. *Garcia v. State*, 541 SW2d 428 (Tex. Crim. 1976); *Boss v. State*, 489 SW2d 580 (Tex. Crim. 1972). Procedural defaults of the sort here involved bar federal habeas review of the merits, absent a showing of "cause" for and "prejudice" by the default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Arguably petitioner has pleaded "cause" by his attack on the effectiveness of counsel. However, he has shown no prejudice and if error exists it is harmless error.

Petitioner's final claim of constitutional deprivation is based on his contention that he was denied effective assistance of counsel during pretrial, at trial, and on appeal. In support of that contention he has detailed twenty separate acts of misconduct on the part of the attorney.

Petitioner contends, first, that the attorney refused to challenge the constitutional makeup and legality of either the Grand Jury or the Petit Jury although petitioner had demanded that he do so. He contends that there was much publicity in the local communication media, endorsed by the district attorney and the trial judge, concerning the duty of jurors in criminal trials.

He contends that during the pretrial hearing on motion to suppress and during the trial on the merits petitioner permitted evidence to be adduced which was not the "best evidence." However, petitioner has pointed to no occasion where improper evidence was in fact received.

By his next two challenges petitioner contends that the attorney refused to seek out and interview potential witnesses and failed to independently investigate the facts and circumstances of the alleged crime and, with full knowledge that he was not going to make the in-

vestigation, he failed to move for the appointment of an independent investigator. However, petitioner has identified no witness or other evidence that could have been discovered by further efforts on the part of the attorney.

The next four challenges are concerned with the evidentiary issues first above discussed wherein petitioner was convicted as a party. Petitioner challenges the failure of the attorney to make any motions questioning the sufficiency of the indictment, that during trial, after he discovered that the state was trying to effect conviction as a party, the attorney failed to move for a recess in order to better prepare for trial, and the attorney failed to present proper motions concerning a fundamental and fatal variance between the allegations in the indictment and the proof. As indicated above petitioner was properly tried as a party. Petitioner has pointed to no specific motion which the attorney should have made which was not made.

Petitioner claims that the attorney failed to oppose a postponement of the trial which the state sought, that the postponement enabled the state to effect the transfer from the jurisdiction of the co-defendant, John Wayne Hudson, whose trial had been severed on the grounds that he was to be a material defense witness, that during the trial and in the arguments the attorney failed to make proper arguments and comments concerning the state's failure to call Hudson as a witness, and the attorney failed to subpoena John Hudson as a defense witness over the strenuous objection of petitioner. Trial strategy must be within the sole province of the attorney. He is the person who can best determine whether or not to call a particular witness and to form some educated opinion as to whether a particular witness will help or hurt the client's cause. It is apparent that the attorney knew of the existence of John Wayne Hudson. The record does not reflect why Hudson was not subponeaed as a witness. However, the

failure of the attorney to call Hudson as a witness on the demand of petitioner, without more, does not reflect on his effectiveness.

Petitioner contends next that the attorney knew that hearsay receipts were going to be offered, but he did nothing to require the preparers of the hearsay receipts to be available for confrontation and cross-examination. Again, petitioner has pleaded no facts which identify the basis for the challenge.

Petitioner contends that the attorney refused the repeated requests of petitioner to ask "some highly pertinent questions" of two of the state's witnesses and that the attorney misstated the law concerning those matters to petitioner. The witnesses are not identified, and there is nothing presented by the allegations which shows that petitioner was denied any constitutional rights by virtue of the failure of the attorney to ask a particular question.

Petitioner claims that he had wanted to testify in his own behalf, but the attorney advised against it because he could be impeached with the prior Tarrant County conviction. There is nothing shown by that challenge which reflects that the attorney erroneously advised petitioner. Had petitioner testified during the first stage of the trial, where guilt or innocence was being determined, he could have been impeached with that prior conviction. The prejudicial effect of that prior conviction *could* outweigh any benefit from the testimony. The fact that the petitioner was convicted regardless does not change the soundness of the advice and does not detract from the effectiveness of the representation by counsel.

Petitioner's next challenge is directed at the failure of the attorney to investigate the prior Tarrant County conviction. As mentioned above, however, the prior of-

fense was a felony at the time that the conviction occurred and it could properly be used for impeachment purposes. Petitioner has pointed to no other deficiency in the prior conviction.

As in the case with most of the challenges discussed above, the remaining challenges to the effectiveness of counsel are vague and conclusory. According to petitioner the attorney became agitated when petitioner refused to accept a plea bargain and thereafter appeared to lost interest in the case, the attorney failed to discuss the case with petitioner during the trial and presented no defense, although the defense which the attorney should have presented is not identified by petitioner. He claims the attorney failed to file motions in arrest of judgment or for new trial, but fails to show how he was harmed by such failure. Finally, he claims that the attorney refused to withdraw from the case when petitioner had demanded that he do so.

For the most part petitioner has presented nothing but vague, conclusory allegations that the attorney did less than what he should have done in the defense of the case. The issue of effectiveness of counsel is not determined by considering acts in isolation, but the totality of the representation must be considered. Review of the statement of facts and of the transcript shows that petitioner had filed motion to suppress the evidence from the search, had properly and effectively presented his theory during the pretrial hearing on motion to suppress, had filed motion for severance, motions in limine, motion for the production and inspection of evidence and information which may lead to evidence, motions to dismiss, motion for instructed verdict, and notice of appeal. During the trial he effectively examined the state's witnesses, properly and reasonably objected to tendered evidence and testimony and in general had developed a defensive theory which was reasonably

calculated to be successful. The fact that the jury rejected that theory does not comment adversely on the effectiveness of the representation. Certainly the standard of representation afforded by the attorney, when viewed over the full spectrum of the representation, was well within the standard announced by *MacKenna v. Ellis*, 5th Cir. 1960, 280 F2d 592 and its progeny, which sets the standard for effectiveness as being counsel reasonably capable of rendering, and actually rendering, reasonably effective assistance.

I recommend that the comprehensive opinion of the Court of Criminal Appeals of Texas be adopted by the court. Further I recommend that the application for writ of habeas corpus be denied.

The clerk is directed to file this Report and Recommendation and to send a copy of it to petitioner and a copy to the attorneys for respondent. Any party may object to the proposed findings and to the recommendation within ten days after having been served with a copy thereof. Such party shall file with the clerk of the court, and serve on the Magistrate and on all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection.

Recommended this 16th day of June, 1981.

/s/

United States Magistrate

APPENDIX D

NO. 5149-B

THE STATE OF TEXAS	§	IN THE 104th
	§	DISTRICT COURT
	§	
VS.	§	OF
	§	
WESLEY TARPLEY	§	TAYLOR COUNTY,
	§	TEXAS

LADIES & GENTLEMEN OF THE JURY:

The Defendant, Wesley Tarpley, is charged with the offense of Credit Card Abuse, alleged to have been committed in Taylor County, Texas, on or about the 27th day of January, A.D., 1976. To this charge the Defendant has pleaded not guilty.

I now give you the law that applies to this case.

1.

A person commits the offense of credit card abuse if he receives services that he knows has been obtained by a person who, with intent to obtain service fraudulently, used a credit card with knowledge that it had not been issued to said person.

2.

So that you may better understand the nature of the offense with which the Defendant is charged, I now define certain terms and words.

3.

The term "credit card" means an identification card, plate, coupon, book, number, or any other device

authorizing a designated person or bearer to obtain property or services on credit. It includes the number or description of the devise if the device itself is not produced at the time of ordering or obtaining the property or service.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Service" includes lodging, restaurant service, and entertainment.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

4.

Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant, Wesley Tarpley, did, in Taylor County, Texas, on or about January 27, 1976, receive services, to-wit: lodging with intent to obtain the service fraudulently, had used a credit card, to-wit: BankAmericard Credit Card No. 4656-100-053-011 belonging to J.M. Gassiot, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley, and was not used with the effective consent of the said J.M. Gassiot, you will find the Defendant guilty.

If you do not so believe, or if you have a reasonable doubt thereof, you will find the Defendant not guilty.

5.

You are further instructed that if there is any testimony before you in this case regarding the Defendant's having committed offenses other than the offense alleged against him in the indictment, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the identity or intent of the Defendant, if any, in connection with the offense, if any, alleged against him in the indictment, and for no other purpose.

6.

All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

7.

This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken

together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the Defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the Defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the Defendant not guilty.

The Statutes provide that, in a criminal case, the Defendant shall have the right to take the stand and testify in his own behalf, but further provides that, if he does not do so, his failure so to do shall not be taken as a circumstance against him, and in this case, you are charged that you cannot take the failure of the Defendant to testify in his own behalf as a circumstance against him, or to consider it for any purpose, and in no event can you comment on or allude in any manner to the Defendant's failure to testify.

8.

The Defendant in a criminal case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and in this case, if you have a reasonable doubt as to the Defendant's guilt, you will say by your verdict "Not Guilty."

9.

You are charged that you cannot consider the fact that an indictment was returned by the Grand Jury against the Defendant in this case as any evidence of his guilt.

10.

The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the Defendant.

11.

Do not let bias, prejudice or sympathy play any part in your deliberations. You are the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given the testimony, but the law of the case you will receive in charge from the Court and be governed thereby.

12

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case. You should not consider or discuss facts and circumstances that are not in evidence, and in this connection you are instructed that no juror may lawfully relate any fact or circumstance of which he or she may claim to have personal knowledge which has not been admitted into evidence before you. If any evidence has been withdrawn from the jury by the Court, you will not discuss or consider it for any purpose.

13.

The only function of the jury under this charge is to find the guilt, if any, or the innocence of the Defendant of the offense charged in the indictment herein; the matter of punishment being the subject of other proceedings. Your verdict must be unanimous.

14.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court, neither are you allowed to separate from each other until your deliberation is concluded. Should you wish to communicate with the Court, put your communication in writing and hand the same to the bailiff for delivery to the Court.

/s/

JUDGE PRESIDING

APPENDIX E

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Taylor, State of Texas, at the Novemeber Term, 1975, of the 104th District Court for said County upon their oaths present in and to said Court that on or about the 27th day of January, A.D., 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid Wesley Tarpley did then and there unlawfully knowingly and intentionally with intent to fraudulently obtain services, to-wit: lodging, belonging to Emmett Martin present and use a BankAmericard credit card, belonging to J.M. Gassiot, hereinafter called card holder, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley and was not used with the effective consent of the card holder,

against the peace and dignity of the State.

/s/

Foreman of the Grand Jury